Committee on Resources

Subcommittee on National Parks and Public Lands

Witness Statement

TESTIMONY OF HOWARD M. CRYSTAL

BEFORE THE HOUSE SUBCOMMITTEE ON

NATIONAL PARKS AND PUBLIC LANDS OF THE

HOUSE COMMITTEE ON RESOURCES

I appreciate the opportunity to testify on H.R. 2874, which proposes amendments to the 1971 Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331, et seq. ("Act"). I am a partner with the public-interest law firm Meyer & Glitzenstein, which has litigated cases on behalf of a wide range of national and grassroots animal protection and conservation organizations, including the Fund for Animals, the Animal Legal Defense Fund, the Animal Protection Institute, the Humane Society of the United States, Defenders of Wildlife, the Biodiversity Legal Foundation, the Sierra Club, the Natural Resources Defense Council, the Center for Marine Conservation, the National Audubon Society, the Alliance for the Wild Rockies, the Earth Island Institute, the Center for Biological Diversity, and the Environmental Defense Fund. With regard to implementation of the Wild Horses and Burros Act, my firm has principally represented the Fund for Animals, but my testimony today is on behalf of the entire Wild Horse and Burro Freedom Alliance, a coalition of over 15 organizations which directly represent over 8 million voters, and which are dedicated to the protection of this nation's heritage of wild horses and burros.

THE WILD HORSES AND BURROS ACT

Before providing some comments on the Amendments proposed by Congressman Gibbons, it is important to put them into some historical context. Thanks to the work of Wild Horse Annie and many others, and as the Senate Report which accompanied the original Wild Horses and Burros Act details, national attention has been focused on the plight of horses and burros on public lands in the Western states for forty years. See S. Rep. No. 242, 92d Cong. (1971). Indeed, the Senate Report explains that prior to the federal protection provided by the Act, wild horses and burros were:

cruelly captured and slain and their carcasses used in the production of pet food and fertilizer. They have been used for target practice and harassed for "sport" and profit. In spite of public outrage, this bloody traffic continues unabated, and it is the firm belief of the committee that this senseless slaughter must be brought to an end.

Id. The Act was passed to stem these abuses, especially in light of Congress' finding that "wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West [and] that they contribute to the diversity of life forms within the Nation and enrich the lives of the American People." 16 U.S.C. § 1331.

To accomplish its purposes, the Act contains three major components. First, it criminalizes the killing, malicious harassment, or removal of wild horses and burros on public lands. Id. § 1338. Second, it authorizes the Secretary of Interior to remove "excess" wild horses and burros from public lands where necessary to maintain a thriving natural ecological balance on the range. Id. § 1333(b). Finally, the Act establishes an adoption program whereby animals removed from the range are provided to adopters, who maintain the animals for a probationary period, after which they may obtain title. Id. § 1333(c).(1)

While the Act protects wild horses and burros, it also protects the rights of landowners who have wild horses and burros stray onto their property, as well as horse or burro owners whose animals stray onto public lands. Regarding the landowners, the Act provides that, upon request, the federal government must remove wild horses and burros from private lands. Id.

§ 1334. As for branded or claimed horses or burros which stray onto public land, the Act affords them no protection from being reclaimed according to state law. Id. § 1335; see United States v. Christiansen, 504 F. Supp. 364 (D. Nev. 1980) (explaining that the Act "requires that a horse be both unbranded and unclaimed for its removal from public land to constitute a crime.")

THE WILD HORSE AND BURRO PRESERVATION

AND MANAGEMENT ACT OF 1999

There are two distinct components to the proposed amendments: funding and direction for a campaign to increase awareness and participation in the wild horse and burro adoption program, and delegation of the authority and funding for implementing the Act within a State to any State whose Governor requests such authority. While the Alliance supports improvements in the adoption program, we are categorically opposed to turning implementation of this important federal statute over to the states, for the reasons explained below.

A. There Are Several Ways To Improve The Adoption Program, Including Increased Publicity and Public Awareness.

The Wild Horse and Burro Freedom Alliance supports the Committee's effort to address issues relating to the Wild Horses and Burros adoption program implemented by BLM. As you may know, one of the concerns which has been raised repeatedly over the years has been the abuse of this program by individuals adopting animals for the purpose of selling them to commercial slaughterhouses after obtaining title. In the 1980s, BLM took the position that it had no basis to withhold title from these individuals, even if agency personnel knew full well that the titled animals were headed to slaughter. As a result of litigation initiated by the Fund for Animals and the Animal Protection Institute, in 1987 the Court of Appeals for the Ninth Circuit called this approach to the adoption program "a farce," and affirmed a lower court injunction prohibiting BLM from giving title to individuals where the agency is aware that they have such an intention. API v. Hodel, 860 F.2d 920 (9th Cir. 1988).

Despite this injunction, as well as Congress' "expressed intent . . . to remove the possibility of monetary gain from the exploitation of these animals," S. Rep. No. 242, the tide of wild horses and burros going to commercial slaughterhouses continued unabated. The reason: BLM adopted another illegitimate approach toward its adoption program, whereby it would studiously avoid finding out adopters' intentions. This way, titled animals continued to go to slaughter, and BLM was arguably not in violation of the Court's injunction.

To address this gaping loophole, which undermined the very purposes of the Act, in 1997 the Fund for Animals and the Animal Protection Institute returned to the Judge who had issued the injunction ten years earlier -- Judge Howard D. McKibben of the Nevada District Court -- asking him to modify the injunction and require BLM to, for the first time, affirmatively inquire into adopters' intentions. In a Settlement of that action, BLM agreed to add statements to its adoption forms whereby adopters now must attest, under penalty of perjury, that they have no intention of selling animals for slaughter. A false statement regarding this intention is a federal crime. 18 U.S.C. § 1001.

Nonetheless, according to recent press accounts, horses are continuing to go to slaughter, including only days after owners sign such statements that they do not intend to commercially exploit the animals, and we are not aware that BLM has taken any enforcement action. If the agency does not prosecute at least some of these violators, its approach toward this problem will not have meaningfully improved.

Given these problems, although the Alliance opposes H.R. 2874, we agree with the effort to provide more funding to the adoption program. Millions of people have never heard of this program. With a national campaign to raise awareness about the opportunities to adopt these animals, the demand will increase, and BLM will be able to better ensure that it permits adoptions only to those who are going to take good care of these animals. In short, while there have been problems, things have improved, and will only continue to improve if the program continues to be administered on a federal level.

Nonetheless, even with an increased demand, it is critical that BLM continue to ensure that adopters are fit to adopt horses and burros, which is the purpose of the probationary period before they are given title. In addition, it is imperative that, to the extent Congress takes action to improve the legitimate demand for these animals, BLM not use such a demand itself as a basis to remove horses and burros from public lands. Decisions to remove "excess" horses must continue to be based solely on a legitimate, scientifically-based determination that there are too many horses for the range to support.

There are also several other measures Congress can take to improve the adoption program, including clarifying the statutory language to make it clear that, even after title is transferred, these animals may not be sold for commercial purposes. In the Alliance's view, Section 1333(d) of the Act already serves this purpose, conditioning the transfer of title on the prohibition that "no wild free-roaming horse or burro or its remains may be sold or transferred for consideration for processing into commercial products." Unfortunately, BLM has interpreted the statute to permit adopters to sell their animals for slaughter upon obtaining title -- which is why we had focused on the statement of intent as an enforcement mechanism.

Congress could substantially aid in the protection of these animals by further clarifying this provision -- i.e., by making it unmistakable that, under the statutory scheme, the transfer of title of these animals is conditioned on the adopter's agreement that the animal may never be sold commercially. Again, this would be entirely consistent with Congress' intention "to remove the possibility of monetary gain from the exploitation of these animals." S. Rep. No. 242. It would also be entirely consistent with conditions Congress places on the disposition of other federal property.

Short of such clarification, the Alliance believes it is imperative that BLM aggressively use the other enforcement tool now at its disposal to address the mistreatment of adopted animals. In particular, BLM must prosecute at least some of the fraudulent adopters who, in recent months, have signed attestations that they have no intent to sell their animals for commercial purposes, only to sell their adopted animals to slaughter immediately thereafter. In our view, a few high profile prosecutions will go along way toward stemming the continuing tide of wild horses at slaughterhouses, even without amending the statute to make

clear that even titled animals may not be used in this manner.

B. The Wild Horses and Burros Act Should Continue To Be

Implemented at the Federal Level.

While the Wild Horse and Burro program administered by BLM has not been free of problems, for several reasons it would be a mistake to enact the other provisions of this proposed legislation, and turn administration of the program over to any State whose Governor asks for such authority.

1. Federal Responsibility Provides An Important Measure of Accountability.

BLM has several important responsibilities under the statute which must be implemented in accordance with the statutory directive. These include rangeland monitoring to determine whether "excess" horses exist; removing only excess animals from the range, based on meaningful data on range conditions, and doing so in a humane manner; treating removed horses properly, including in their transportation to other facilities; and ensuring adoption to suitable adopters.

Under basic principles of administrative law, when BLM makes decisions related to these tasks, those decisions are subject to judicial review in federal court as to whether they are "arbitrary, capricious, or contrary to law." 5 U.S.C. § 706. For example, it was under this standard that the Fund For Animals and Animal Protection Institute were able to bring reforms to the adoption program, putting an end both to adoptions to those with known intentions to sell to slaughter, and the policy of trying to avoid finding out adopters' intentions.

Similarly, although the Act provides BLM with some discretion in determining whether there are excess horses on the range, those determinations must be grounded in empirical evidence. Indeed, even Interior's own administrative court, the Interior Board of Land Appeals, has taken BLM to task where it has failed to base removal decisions on actual data concerning the status of the range.

In addition to this aspect of accountability, administration of the Wild Horses and Burros Act is also subject to the National Environmental Policy Act (NEPA), our national charter for the protection of the environment. Under this statute, when BLM engages in a horse removal action that might have significant environmental impacts, it must at least prepare an Environmental Assessment, evaluating those impacts and giving some meaningful consideration to alternatives which might also achieve the range protection objectives sought by the removal. As a practical matter, this NEPA process is often the only opportunity the public is afforded for input into these decisions.

On the other hand, it is not clear how accountability in the Wild Horses and Burros program will be preserved under the proposal to turn implementation of the program over to the States. Although a state program with sufficient federal involvement is often subject to NEPA review, it is not clear that NEPA would apply to all aspects of state implementation of the Wild Horses and Burros Act.

Review under the Administrative Procedure Act rests on even less secure footing, leaving the risk that a state might engage in the very kinds of abuses that led to the passage of the Act, without there being any mechanism to ensure accountability. Thus, for example, what happens if a state which has obtained authority to administer the Act decides that the "appropriate management level" of wild horses and burros in that state is zero, and removes them all? Or what if a state engages in inhumane removal practices, such as

roundups during the foaling season, or moving horses in inappropriately enclosed vehicles? Or what if a state does what BLM had been doing until ordered to stop by a federal court -- i.e., letting people adopt animals for the sole purpose of selling them for slaughter? Indeed, one practical concern of the Alliance is that for more than ten years Congress has expressly forbid BLM from using annual Interior appropriations to kill wild horses or burros. Such restrictions might be found not to apply to a program administered by a state, particularly if the state were to utilize its own funds, or other appropriated federal funds, for this purpose. From the standpoint of the Alliance, these possibilities raise grave concerns over the prospect of turning the program over to the States.

Accountability to Congress should be no less of a concern. In enacting the statute, Congress understood that ongoing Congressional oversight would be necessary to ensure the effective implementation of the Act. Thus, the statute requires that every two years the Secretaries provide a Report to Congress on the administration of the Act, including enforcement efforts. Certainly, if, in light of this information, Congress wanted to alter the administration of the Act, it could do so legislatively. It is far less clear how and whether Congress could take steps to improve a state's administration of the Act, short of revoking the very authority which these amendments seek to provide. In short, turning the program over to the states removes the accountability which is necessary to ensure that this program remains true to its purposes: to protect these animals from abuse and mistreatment.

2. Putting Wildlife Protection in State Control is Not Always Sound Policy.

Prior to the Wild Horses and Burros Act, wild horses and burros were subject to state management and estray laws. It was under precisely such "protections" that Congress found that these animals were being "used for target practice and harassed for 'sport' and profit." Consequently, the Alliance is hardly optimistic about returning protection of these animals to the States.

However, it is important to recognize that wild horses and burros are not unique among the wildlife that we as a nation have determined require federal, over and above state, protection. The Migratory Bird Treaty Act, the Marine Mammal Protection Act, and the Bald Eagle Protection Act are all examples of federal legislation designed to provide a measure of needed federal protection to wildlife which was not otherwise being adequately protected under state laws.

Perhaps our most important national wildlife protection effort is the Endangered Species Act, which provides federal protection for any species of plant or wildlife which is threatened with or in danger of extinction. A number of recent situations involving that statute highlight how frequently states themselves are simply unwilling, or unable, to provide wildlife within their borders the protections needed to ensure their continued survival.

For example, our Nation is facing the extinction of stocks of Salmon species on both the East and West coasts. In both Oregon and Maine, the States themselves have tried to develop conservation plans in an effort to save these species without federal protection. In Oregon, a federal judge found the plan inadequate, and the species has now been federally listed. In Maine, the federal agencies themselves have in recent weeks acknowledged that the Maine plan is not protecting the species, and that they intend to provide the necessary federal protection.

There are many other examples of inadequate state protection for wildlife, such as the manatees in Florida, where the State has not stemmed the increasing numbers of manatee deaths from motor boat collisions. In short, not only is their nothing unique about federal protection for wild horses and burros, but such

protection of wildlife is often necessary in order to ensure that our national heritage is preserved. Given the past indicators that wild horses and burros will not be adequately protected by the states, it is imperative that protection of wild horses and burros remain a federal matter, rather than an issue returned to the States.[(2)]

3. Unless Congress Ensures that the States Will Properly Administer the Act, These Amendments Void The Statutory Scheme.

Imagine that Congress required the Environmental Protection Agency to administer the Superfund Clean-up program by giving a proportionate share of clean-up funds to any state whose governor asks to administer the program, without any assurances that the State is capable of, or will in fact conduct, the clean-up required by the Statute. Or imagine letting States administer the Resource Conservation and Recovery Act hazardous waste permitting program, without any details as to how the State will protect its citizens from hazardous waste. Or imagine a delegation of the Clean Water Act to a state, where no one has any idea whether the state has the personnel or expertise to regulate discharged pollutants.

There is no functional difference between these patently absurd scenarios and the proposed amendments to turn the administration of the Wild Horses and Burros Act over to the States, just for the asking. In short, what assurance will there be that the applying state has the personnel, expertise, and infrastructure to handle such a program? And what measure of accountability will there be if they do not, especially given that, as written, the amendments require the Secretary to turn over the program to any Governor who asks, and has no provisions for revocation under any circumstances.

Let me be perfectly blunt about the Alliance's view on this approach to the implementation of the Wild Horses and Burros Act: it would be the equivalent of eliminating the program altogether. In short, if this is where the statue is headed, it would be better to simply void it altogether, so the American people can fully understand what you are doing to these living symbols of the West.

RECOMMENDATIONS

1. The Wild Horses and Burros Act must continue to be implemented as a federal program.

2. Increased funding and a media campaign for the adoption program would assist in this implementation.

3. Other possible improvements include the following:

a. An outright prohibition on the commercial sale of these animals even after

title transfer.

b. Congressional oversight to ensure that BLM makes appropriate use of its newest prosecution tool -- the statement signed by individuals upon obtaining title which provides that they have no intent to put the animals to commercial use.

c. Reestablishing a balance which we believe was lost with the 1978 amendments to the statute, amendments which increased the Secretaries' discretion in making removal decisions. In particular, in over twenty years of watching BLM administer this program, it has become increasingly clear to the Alliance that, rather than keep interference with these animals to the "minimal feasible level," and managing the range "principally" for their welfare, as required by the Act, 16 U.S.C. §§ 1333(a), 1332(c), BLM's removal

decisions are too often driven by consideration for public lands grazing concerns. That is, rather than give a preference to preserving wild horses and burros where they were found in 1971, or even maintaining a balance in considering reductions in horse numbers as against reductions in grazing, in too many cases the practice has been that the horses go, and the grazing stays.

d. Ensuring that these animals are not still "fast disappearing from the American scene." Id. § 1331. BLM's statistics show that there are more than fifty herd management areas where BLM has removed all the horses. The statistics on the numbers of horses left are similarly disturbing: over 70% of the remaining herds have fewer than 150 animals, raising serious concerns regarding their genetic viability. BLM should carry out the statute's original purpose by, at a minimum, continuing to maintain horses in the areas where they existed in 1971; managing those areas "principally" for these animals by removing them only when new data shows they are significantly deteriorating the range; and ensuring that sufficient numbers of horses remain to maintain the long-term genetic viability of the herds.

CONCLUSION

Thanks to the efforts of Velma Johnston -- Wild Horse Annie -- and the millions of Americans she inspired, Congress took action in 1971 to protect wild horses and burros from the kind of mistreatment they had received for decades while subject only to state laws. In fact, Congress received more mail advocating protection of these animals than it has ever received on any other issue, save the Vietnam War.

Thirty years later, these animals have still not received all of the protections sought by many millions of people who care deeply about the protection of these animals. However, the only way they are going to obtain the full protections they deserve as living symbols of the West is to maintain the Act as a federal program. Thus, we urge the Committee to decline to delegate this program to the states, and instead seek ways to improve the implementation of this important federal statute.

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Outline of Comments

A. There Are A Number of Ways To Improve The Adoption Program, Including Increased Publicity and Public Awareness.

B. The Wild Horses and Burros Act Should Continue To Be

Implemented at the Federal Level.

1. Federal Responsibility Provides An Important Measure of Accountability.

2. Putting Wildlife Protection in State Control is Not Always Sound Policy.

3. Unless Congress Ensures that the States Will Properly Administer the Act, These Amendments Effectively Void The Statutory Scheme.

Summary of Recommendations

A. The Wild Horses and Burros Act must continue to be implemented as a federal program.

B. Increased funding and a media campaign for the adoption program would assist in this implementation.

C. Other possible improvements include the following:

1. An outright prohibition on the commercial sale of these animals even after title transfer.

2. Congressional oversight to ensure that BLM makes appropriate use of its newest prosecution tool -- the statement signed by individuals upon obtaining title which provides that they have no intent to put the animals to commercial use.

3. Congressional oversight to maintain horses in the areas where they existed in 1971; managing those areas "principally" for these animals by removing them only when they are significantly deteriorating the range; and ensuring that sufficient numbers of horses remain to maintain the long-term genetic viability of the herds.

Endnotes

1. The Act's provisions apply to the Secretaries of Interior and Agriculture respectively. In turn, these Secretaries have delegated day-to-day management for the program to the Bureau of Land Management (BLM) and Forest Service. Because most protected horses and burros are on BLM land, in this testimony I will refer to the activities of BLM.

2. Although some have argued that the Wild Horses and Burros Act is an unconstitutional usurpation by the federal government of wildlife management authority which belongs to the States, the United States Supreme Court squarely addressed this issue in its unanimous decision in Kleppe v. New Mexico, 426 U.S. 529, 546 (1976), where the Court rejected a constitutional challenge to the Act, explaining that the Constitution's Property Clause "gives Congress the power to protect wildlife on the public lands, state law notwithstanding."

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